Supreme Court, U.S.
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No. 85-1691

In the Supreme Court of the United States

October Term, 1985

SANFORD BERNSTEIN,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, JAMES McCARTHY, COUNTY OF LEHIGH, WILLIAM PLATT, ANTHONY PADRONE, WULF HEUSINGER, THOMAS MURTAUGH, DONALD LAYTON, DALE YEAGER, MICHAEL ALVIN, JIMMY H. COLEMAN, NANCY H. BERNSTEIN, CATASAUQUA POLICE DEPARTMENT, ALLENTOWN POLICE DEPARTMENT, WOODROW KEISER,
Respondents

Reply of Nancy H. Bernstein to Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

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I. COUNTER-STATEMENT OF THE CASE

Respondent accepts the Statement of the Case recited in the Petitioner's brief. However, for purposes of clarification, Respondent adds the following pertinent information.

The crux of Mr. Bernstein's complaint revolves around the recantation by Commonwealth witness Coleman. Mr. Coleman had recanted his trial testimony on March 17, 1980, giving other statements apparently implicating Murtaugh, Padrone and a Wulf Heusinger of intimidating him into testifying against Mr. Bernstein at trial and threatening him not to change his story afterwards.

The first hearing on remand from the Superior Court to test Mr. Coleman's credibility took place on April 4, 1983. Counsel for Mr. Bernstein requested that the Court grant Mr. Coleman immunity. The Court refused. Mr. Coleman thereafter pleaded the Fifth Amendment in response to questions by Mr. Bernstein's counsel.

The April 4th hearing was eventually continued because certain matters had been filed in the Superior and Supreme Courts and a question arose as to whether or not the Common Pleas Court had jurisdiction.

On May 5, 1983 Mr. Coleman gave a statement in the District Attorney's office of Lehigh County, following an offer by the District Attorney of immunity from prosecution as a result of anything growing out of the statement given on March 17, 1980 or any statement Mr. Coleman

would give to the District Attorney on May 5, 1983. In other words the District Attorney would not charge Mr. Coleman with perjury at that point. Mr. Coleman then proceeded to testify that the testimony he gave at Mr. Bernstein's original trial was truthful and that the recantation statements made in September and October of 1980 were not truthful. Mr. Coleman's testimony to that effect was repeated at the resumption of the hearing on the credibility of Mr. Coleman's recantation in the Dauphin County Court of Common Pleas on July 1, 1983. Following that hearing and a final hearing on September 9, 1983, the motions for a new trial based on Mr. Coleman's recantation were dismissed and the sentence reinstated.

II. SUMMARY OF ARGUMENT

At least with respect to the within action, it is not necessary to draw a distinction between characterizing Petitioner's actions under 42 U.S.C. §1983 and his claims under 42 U.S.C. §§1981, 1982, 1985 and 1986. Such characterization is controlled by the nature of the allegations in the Complaint. In the instant action all of the Petitioner's civil rights actions are based on the exact same allegations and requests for remedy. Therefore they should all be treated the same for purposes of statute of limitations whether or not they fall within the ambit of *Wilson v. Garcia,* U.S. , 105 S.Ct. 1938 (1985).

In the alternative, should this Court consider it necessary to determine the appropriate characterization of actions under 42 U.S.C. §§1981 and 1985, it is respectfully submitted that the reasoning of *Wilson v. Garcia,* should apply.

With respect to Respondent's second claim, this Court has already resolved the issue of retroactivity in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971). The retroactive application of *Wilson v. Garcia,* supra, to the within case is appropriate under the existing standards of *Chevron Oil,* supra.

Petitioner's third argument requests this Court to establish a uniform standard for determining the date a statute of limitations begins to run in a civil conspiracy. It is respectfully submitted that the District Court applied the appropriate test; that the period runs from each overt act

causing damage. While some courts have applied the rule used in criminal cases (that is that limitations periods run from the commission of the last overt act of the conspiracy), Respondent respectfully submits that this is not the appropriate standard for a civil conspiracy.

Petitioner's last two arguments, requesting this Court to exercise its supervisory powers or in the alternative to remand the case for clarification, are merely rehashings of the position Petitioner takes elsewhere in his brief.

III. ARGUMENT

A. Wilson v. Garcia requires that all of the Petitioner's civil rights actions be governed by the same Statute of Limitations.

Count I of Petitioner's Complaint alleges at Paragraph 42 violations of 42 U.S.C. §§1981, 1982, 1985 and 1986 (Appendix at A-87). All of the alleged violations are based on the facts pleaded to that point. There is no distinction drawn by Petitioner between activities which allegedly led to his §1983 cause of action vis-a-vis any of the other civil rights sections.

Although in *Wilson v. Garcia,* supra, this Court decided that the personal injury statute of limitations was applicable to §1983 actions, the Court's reasoning strongly suggests that the same holds true for other civil rights violations which are of a similar nature.

As noted in *Wilson,* supra, the controlling section of the civil rights statute with respect to which statute of limitations should apply is §1988. This section requires that the length of limitation period be governed by state law, and applies to all of the statutory sections in Petitioner's Complaint. Furthermore, as the Court noted:

> Even though §1983 actions encompass a wide variety of fact situations and legal theory, all of the Federal values at issue in selecting a limitations period for 1983 claims are best served by articulating one

uniform characterization describing the central nature underlying all such claims. (Citing the 10th Circuit Opinion in *Wilson v. Garcia,* 731 F.2d 643 at 6501), *Wilson v. Garcia,* 105 S.Ct. at 1941 (1985).

That the *Wilson* reasoning encompasses more than simply §1983 actions is further confirmed by the language of the Court's Opinion where it states:

> The imposition of the policies of the States on matters of civil rights is not the primary office of the borrowing provision in §1988; rather the statute is designed to insure that neutral rules of decision will be available to enforce *the civil rights actions, among them §1983. Wilson v. Garcia,* 105 S.Ct. at 1943. (Emphasis added.)

The choice of a personal injury statute of limitations was applied by the Court in §1983 actions because of the nature of remedies involved therein. In the case at bar, not only are all of Petitioner's civil rights actions based upon the same factual allegations, but they all request the precise same remedies. These factual allegations and the remedies requested, reflect what this Court observed as the unifying theme of the Civil Rights Act of 1871; protection against personal injury. *Wilson v. Garcia,* 105 S.Ct. at 1948.

The application of *Wilson v. Garcia,* supra, where similar factual allegations have been said to give rise to differing civil rights causes of action, was foreshadowed by the practice in the Third Circuit. (See Argument B, infra.)

Petitioner takes issue with the District Court's decision that all of Petitioner's claims should be pursued

through §1983. However, §1983 is certainly the broadest and most sweeping of the civil rights statutes. *Campbell v. Gadsden County District School Board,* 534 F.2d 650 (Cir. 5, 1974). Petitioner argued below that §§1981 and 1983 should be characterized differently because they seek separate remedies, an argument which is not advanced in his Brief to this Court. However, Petitioner's pleadings request precisely the same remedies under each of the civil rights violations alleged. Moreover, the §1986 action for neglecting to prevent violation of civil rights is dependent upon a violation having been committed under the others.

Petitioner has yet to relate specific factual allegations to each of the alleged civil rights statutes so as to reflect the uniqueness of each statute and its remedies. Judge Cahn was correct in characterizing §1983 as the most appropriate vehicle for the factual claims made by the Petitioner. However, even if that were not so, it is submitted that the statute of limitations would bar the other statutory actions as well.

B. There is no conflict as to the retroactive application of Wilson v. Garcia. This issue is controlled by this Court's prior holding in Chevron Oil Co. v. Huson.

The Petitioner suggests that a conflict exists because different results have been reached, even within the Third Circuit as to whether *Wilson v. Garcia,* supra, should be applied retroactively.

This Court has established both general guidelines and limited exceptions to the retroactive application of new principles of law. The general guideline is as follows:

Argument

> The presumption that the holding of the case will be applied retroactively as well as prospectively is merely a corollary of the principle that federal courts should apply the law in effect at the time that the cases are adjudicated. *Gulf Offshore Company v. Mobile Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981).

The exceptions to retroactive application were determined by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The factors set forth in *Chevron* are: 1. the likelihood that the litigant may have relied on "clear past precedent" or an inability to foresee the direction in which the appellate court was moving in an issue of first impression; 2. the prior history, purpose and effect of the new rule of law; and 3. to what extent a retroactive application would work an inequitable hardship on the litigant.

C. The standard for determining the date on which a civil conspiracy accrues, as properly applied by the District Court, is the date of each overt act causing damage.

Petitioner would have this Court believe that an improper standard was applied by the lower Courts in determining when his cause of action accrued. Such is not the case. It is admitted that the Memorandum Opinion of the Third Circuit did not address the issue of accrual in detail. However, that Court's indication that the "cause of action arose in March 1980 when he knew, or with reasonable diligence should have known, of the conspiracy." Bernstein, No. 85-1371 (3d. Cir. Jan. 15, 1986), (Appendix at A-2), must be read in conjunction with the more detailed statement of the District Court.

Argument

The District Court's discussion of the Petitioner's "due diligence" was not with respect to accrual of the cause of action but rather a response to Petitioner's claims that the statute was tolled by fraudulent concealment (Appendix at A-13, A-14).

While accrual and tolling may at times be opposite sides of the same coin, they are nevertheless treated distinctly. The question of accrual is governed by federal law, matters of tolling are governed by state law. *Wilson v. Garcia,* 105 S.Ct. at 1943.

Pennsylvania requires that a party asserting a claim has a duty to use all reasonable diligence to properly inform himself of facts and circumstances on which his right of recovery is based and to institute suit within the prescribed statutory period. *Schaffer, Appellant v. Larzelere,* 410 Pa. 402, 189 A.2d 267 (1963).

In determining the date of accrual of his cause of action, the District Court correctly noted that:

> Moreover, despite Plaintiff's conclusory allegations of continuing conspiracy, the record fails to establish any post-conviction conduct on the part of the Defendants for which Plaintiff may seek relief (Appendix at A-12).

This analysis is in line with the well stated rule that the period in a civil conspiracy runs from each overt act causing damage. *Ammulung v. City of Chester,* 498 F.2d 811, 814-15 (3d Cir. 1974). It is true that some courts have applied in civil cases, the rule used in criminal cases that the limitation period begins on the commission of the last overt act of the conspiracy. *White v. Bloom,* 621 F.2d 276 (8th Cir., *cert. den.* 449 U.S. 995 1980).

Argument

It is respectfully submitted, however, that there is reason for making the distinction between a criminal and civil conspiracy as pointed out by the Third Circuit in *Wells v. Rockefeller,* 728 F.2d 209 (3d Cir. 1984). There the court defended its application of the "each overt act causing damage" rule, noting:

> The rule generally adopted by the case law in this Circuit provides greater certainty as to when a particular cause of action arises. For each act causing injury, a claimant must seek redress within the prescribed limitations. Such a rule is consistent with the distinction between civil and criminal conspiracies. In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context. *Wells,* 728 F.2d at 217.

In the within case, the Petitioner alleges that the payment of monies and manipulation of Coleman's testimony following the first recantation hearing give rise to new causes of action. While these acts may continue the ill effects of the original alleged violation, they do not constitute new causes of action. *Sandutch v. Muroski,* 684 F.2d 252 (3rd Cir. 1982); *Gaito v. Strauss,* 249 F. Supp. 923 (W.E.Pa. 1966), aff'd 368 F.2d 787 (3d Cir. 1966), *cert. den.,* 386 U.S. 977 (1967).

Petitioner's argument that the present case is unlike *Gaito* and *Sandutch* because there were independent acts committed within the two years prior to the filing of the complaint is belied by the facts. Take for instance the argument with respect to the receipt of funds. Petitioner argues that certain "co-conspirators accepted payments from Nancy Bernstein in exchange for compromising their posi-

tions of authority as part of the conspiracy from about December 1978 to the present." Certainly payment for a prior act of conspiracy does not in and of itself constitute a new act, no matter how long it takes to pay off the alleged original act.

Additionally, the record establishes that at the evidentiary hearing on recantation held April 4, 1983, Mr. Bernstein's attorney requested the Court to issue Mr. Coleman immunity; something which only the District Attorney's office has the authority to do. When the Court denied the request, Mr. Coleman, in response to questioning by Mr. Bernstein's counsel, took the Fifth Amendment and refused to answer (Third Circuit App. at 43-89). Throughout that hearing he refused to answer any questions concerning the nature of his alleged recantation. Therefore, as of that point, without any allegations of either continuing or new conduct on the part of any of the Defendants, save Mr. Coleman, Mr. Bernstein was in no better position than he had been on the date of his conviction. Mr. Coleman's refusal to testify left his trial testimony intact.

At the meeting on May 5, 1983 the District Attorney offered Mr. Coleman immunity if he would tell the truth. Accepting said immunity, Mr. Coleman then testified that his recantation was untrue and that his trial testimony was true. Whatever the characterization of the District Attorney's actions may be in this respect, the result was certainly to cause no more harm to Mr. Bernstein. Whether Mr. Coleman chose to plead the Fifth Amendment as he did in the April hearing prior to any alleged misconduct of the District Attorney, or whether under immunity he denied his recantation, the result with respect to Mr. Bernstein's

civil rights was exactly the same. No new damages were created.

D. The Third Circuit did not depart so far from the acceptable and usual judicial standards as to warrant the exercise of this Court's power of supervision.

This is the section where Petitioner "bangs on the table." Displeased with the outcome of his case in the District Court and the Third Circuit, having neither strong legal nor factual arguments to rely on, he adds the lower Courts to the number of conspirators against him.

It is respectfully submitted that the popularity, or lack thereof, of the Petitioner had nothing to do with his criminal conviction, and certainly nothing to do with the decisions of the District Court and Third Circuit Court below.

E. There is no need to remand this case for further proceedings.

Petitioner suggests that if this Court denies a grant of certiorari, it should remand the case for further proceedings or clarification of the record. The specific issue which Petitioner raises that is claimed to need clarification appears to be whether it was proper for the District Court to dismiss those civil rights actions other than Section 1983. Admittedly, the District Court may not have anticipated that the case would turn on a statute of limitations questions at the time it dismissed the Petitioner's other civil rights action.

Argument

However, for the reasons set forth in Argument A, supra, it is respectfully submitted that, given the character of the Petitioner's factual allegations, the two year Pennsylvania statute of limitations for personal injury actions applies to all of his civil rights claims. Therefore, there is no need to reopen the case to discover why the District Court allowed the case to proceed on only the Section 1983 claim.

IV. CONCLUSION

For the reasons set forth above, Respondent Nancy H. Bernstein respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied. In the alternative, should this Court find it necessary to determine the substantive issues involved, it is respectfully submitted that for the reasons set forth above, the Order of the Third Circuit Court of Appeals should be affirmed as a summary disposition of this matter.

Respectfully submitted,

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